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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 757.

HENRY W. GORANSON,
Administrator with the Will Annexed of the Estate of
Harold T. Goranson, deceased,
Petitioner,

vs.

CAPITAL AIR LINES, INC.,
and
UNITED AIRLINES, INC.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

COUNTER STATEMENT OF QUESTIONS PRESENTED.

1. Is a United States District Court, sitting in Ohio, required to follow the Ohio conflict of laws rule in determining which state law provides the measure of damages in an action for wrongful death resulting from an accident in Virginia?

2. In ascertaining the Ohio conflict of laws rule determining the measure of damages for a wrongful death action created by a Virginia statute, should the Federal Courts follow existing Ohio law rather than predict that the Ohio courts would change the Ohio law?

3. Do the "equal protection of the law" or "due process of law" clauses of the Fourteenth Amendment of the

Constitution of the United States prevent the application of the Virginia statutory limit of recovery for this wrongful death action?

4. Is the decision of the Court of Appeals for the Second Circuit in *Pearson vs. North East Airlines, Inc.*, 309 F. 2d 553, cert. den. 372 U. S. 912, in conflict with the decision of the Court of Appeals for the Sixth Circuit in this case?

STATEMENT OF FACTS.

Petitioner's statement of the case and material facts are for the most part correct and we accept the same with the exception of the following qualifications. The allegation of the complaint that plaintiff's decedent, Harold T. Goranson, was domiciled in the State of Ohio at the time of his death is in issue. The claimed Ohio domicile of the decedent appears to be the only possible "contact" of the State of Ohio with this occurrence.

ADDITIONAL STATUTE INVOLVED.

In addition to the statutes set forth in respondents' brief, Ohio Revised Code, Section 2125.01, is involved. This statute reads in part:

> "When death is caused by a wrongful act, neglect, or default in another state, territory, or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state, territory, or foreign country, such right of action may be enforced in this state. Every such action shall be commenced within the time prescribed for the commencement of such actions by the statute of such other state, territory, or foreign country."

ARGUMENT AND AUTHORITIES.

1. Is a United States District Court, sitting in Ohio, required to follow the Ohio conflict of laws rule in determining which state law provides the measure of damages in an action for wrongful death resulting from an accident in Virginia?

The United States District Court and the United States Court of Appeals for the Sixth Circuit answered this question "Yes."

The effort of petitioner throughout has been to secure a decision from the Federal Courts that the Ohio conflict of laws rule is antiquated, arbitrary and unrealistic and, in the court below, that the choice of laws issue should be decided in terms of "national law" to which *Erie Railroad vs. Tompkins,* 304 U. S. 64, should not apply. In the Petion for Writ of Certiorari (pages 9 to 14), the argument is advanced to a different question, which was not asserted below. This is petitioner's apparent contention that the divergent damage rules of Ohio and Virginia should be regarded as not creating a legitimate "conflict of laws," asking this Court to analyze the relative state interests and to find it not properly a choice of law question at all, in order to make a determination, independent of state conflict rules, as to which rule of damages should be applied.

In *Klaxon Co. vs. Stentor Electric Mfg. Co.,* 313 U. S. 487, this Court said (pp. 496-497):

> "We are of opinion that the prohibition declared in *Erie R. Co. v. Tompkins,* 304 U. S. 64, against such independent determinations by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. See *Erie R. Co. v. Tompkins, supra,* at 74-77. Any other ruling would

do violence to the principle of uniformity within a state, upon which the *Tompkins* decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws. Subject only to review by this Court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law. Cf. *Milwaukee County v. White Co.*, 296 U. S. 268, 272. This Court's views are not the decisive factor in determining the applicable conflicts rule. Cf. *Funkhouser v. J. B. Preston Co.*, 290 U. S. 163. And the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be."

The District Judge and the Court of Appeals correctly considered themselves bound by state determinations of the applicable conflict of law rule. There is no unsettled or novel question of the federal diversity function for review by this Court.

2. In ascertaining the Ohio conflict of laws rule determining the measure of damages for a wrongful death action created by a Virginia statute, should the Federal Courts follow existing Ohio law rather than predict that the Ohio courts would change the Ohio law?

The United States District Court said "Yes," and the United States Court of Appeals for the Sixth Circuit, also answering "Yes," said:

"* * * We are not at liberty to adopt a new rule of conflict of laws for Ohio, in the face of such a well established rule as is now practiced in Ohio."

Respondents contend the answer in both lower courts is correct.

Petitioner in his third and fourth questions presented for review complains that the Court of Appeals should have stated a new rule, contrary to the existing law in Ohio, concerning the measure of damages for a wrongful death action created by a Virginia statute.

There is no doubtful or unsettled question of Ohio law to be clarified in this case. The Court of Appeals for the Sixth Circuit stated the Ohio law succinctly in its prior opinion in *Goranson v. Kloeb,* 308 F. 2d 655. The court said on page 656:

> "Ohio recognizes the application of the principle of 'lex loci delicti' in wrongful death cases. Ellis, Admx. v. Garwood, 168 Ohio St. 241, 152 N. E. 2d 100 (1958). The measure of damages is governed by the law of the place where the accident occurred. Louisville & N. Rd. Co. v. Greene, Admx., 113 Ohio St. 546, 149 N. E. 876 (1925); Alexander v. Pennsylvania Co., 48 Ohio St. 623, 636, 30 N. E. 69; Weiser, Admr. v. Smith, 73 Ohio App. 380, 56 N. E. 2d 522; Ford Motor Co. v. Barry, 30 Ohio App. 528, 165 N. E. 865; Louisville & N. Rd. Co. v. Greene, Admx., 26 Ohio App. 392, 160 N. E. 495. See also: Duskin v. Pennsylvania-Central Airlines Corp., 167 F. 2d 727, 732 (C. A. 6)."

It might be added that Ohio has never recognized an action for wrongful death except as a creature of statute. "No right of action existed at common law for death by wrongful act." *L. & N. Rd. Co. v. Greene, Admx.,* 113 O. S. 546, at page 550; *Sabol v. Pekoc,* 148 O. S. 545, at page 549. The Ohio courts have necessarily therefore looked to the statute creating a foreign cause of action not only for the source of the right, but also its conditions and limitations, as, for example, the proper parties (*Carlson v. Glenn L. Martin,* 103 F. S. 153 (N. D. Ohio E. D.,

1952)) defenses (*Shaffer, Admx. v. N. Y. C. Rd. Co.*, 66 O. App. 417, 34 N. E. 2d 792 (1940)) and elements of damage (*L. & N. Rd. Co. v. Greene, Admx.*, 26 O. App. 392 (1927)).

The Ohio courts have uniformly referred to the lex loci for the law of the measure of damages:

L. & N. Rd. Co. vs. Greene, Admx., 113 O. S. 546 (1925);

L. & N. Rd. Co. vs. Greene, Admx., 26 O. App. 392 (1927, following the retrial of the same case referred to in 113 O. S. 546);

Weiser, Admx. vs. Smith, 73 O. App. 380 (1943).

This action is cognizable in the Ohio courts, but as a creature of the statutes of Virginia, where the accident occurred, and with the nature of the actionable conduct, the parties in whom the right inheres, and the nature and extent of the damages provided to be determined according to the terms of the statute creating and shaping the right—in this case the Virginia statute.

The principal thrust of petitioner's argument appears to be that the Court of Appeals for the Sixth Circuit should have ignored, and that this Court should now ignore, the Ohio Supreme Court's decisions in *L. & N. Rd. Co. vs. Greene*, 113 O. S. 546, and *Ellis vs. Garwood*, 168 O. S. 241, and declare a new conflict of laws rule for Ohio, upon the hopeful supposition that the Ohio courts will some day follow the dictum of the New York case *Kilberg vs. Northeast Airlines*, 9 N. Y. 2d 34, 172 N. E. 2d 526 (1961).

No reported Ohio case indicates any such view; in no case has an Ohio court adopted a part of the wrongful death statutes of another state and discarded others. There has been no indication of change in Ohio law since

the United States Court of Appeals for the Sixth Circuit said in *Goranson vs. Kloeb:*

> "To our knowledge, Ohio has not adopted the New York dictum. Until the Ohio courts have spoken on the subject, we must follow the law as it is. We should not attempt to make new law for the state in conflict with its existing decisions." 308 F. 2d at 656, 657.

Petitioner cites *Richards vs. United States,* 369 U. S. 1 (1962), as support for his position. We advance it as authority for denial of the writ. In that case, suits were filed in the Federal District Court in Oklahoma to recover from the United States under the Federal Tort Claims Act for additional amounts which were claimed to be due plaintiffs under the Oklahoma wrongful death act, which contains no limitation on the amount a single person may recover from a tortfeasor. The petitioners were the personal representatives of passengers killed when a commercial airplane crashed in Missouri while enroute from Oklahoma to New York. The maximum amount under the Missouri wrongful death act had either been paid or tendered to them by the airline. The claims included allegations that the Government through its agencies was negligent and that such negligence occurred in Oklahoma. The District Court of Oklahoma dismissed the complaint and the Court of Appeals affirmed. On a writ of certiorari, this Court affirmed such dismissal. This Court said in subparagraph (c) of the syllabus:

> "Both the Federal District Court in Oklahoma and the Court of Appeals for the Tenth Circuit have interpreted the pertinent Oklahoma decisions as declaring that an act for wrongful death is based on the statute of the place where the injury occurred that caused the death; that determination of the question of state law is accepted by this Court and is controlling here;

> the Missouri statute, therefore, controls the case; and petitioners have failed to state claims upon which relief could be granted."

In the present case, the Federal District Judge and the Court of Appeals for the Sixth Circuit have each twice reviewed the Ohio decisions, and have found existing Ohio law to be not in doubt.

As in *Richards*, we believe this Court will accept the lower courts' determination of the question of state law and find that the Petition for Writ of Certiorari should be denied.

3. Do the "equal protection of the law" or "due process of law" clauses of the Fourteenth Amendment of the Constitution of the United States prevent the application of the Virginia statutory limit of recovery for this wrongful death action?

The United States District Court in effect said "No," and the United States Court of Appeals for the Sixth Circuit, in affirming the lower court, said:

> "We find no merit to the constitutional questions concerning the Virginia Statute * * *."

Respondents contend the answer in both lower courts is correct.

This Court has said, in *Richards vs. United States*, 369 U. S. 1, that a state whose contact with the activity is sufficiently substantial may in its choice of law process constitutionally apply to the decision of the case the law of one or the other state having an interest in the activity. Petitioner here, in arguing against the inflexibility of the Ohio lex loci rule as it affects his case, urges the Court to a view that the Equal Protection and Due Process clauses of the Fourteenth Amendment require such uniformity of

result of the choice of laws that Ohio (whose interest petitioner asserts is paramount) may not select the Virginia law, or lex loci, but must apply the lex fori.

The District Court and Court of Appeals in this case found nothing to discuss in petitioner's contentions.

Congress has not provided a civil action for damages for wrongful death in its regulation of commercial air travel. Title 49 U. S. C. A., Chapter 20, Subchapter IX, provides penalties for violation enforceable by the government, but no provision is made for private action. This is left to state law.

The federal courts have affirmed the constitutionality of statutes like Section 8-636 of the Code of Virginia, 1950, providing a maximum dollar limit on recovery of damages. In *Richards vs. United States*, 285 F. 2d 521, affirmed 369 U. S. 1 (1961), the 10th Circuit Court of Appeals held that the Missouri (lex loci) statutory limit controlled the amount of recovery and said:

> "But in creating the statutory right of action for wrongful death, it was competent for Missouri to fix the maximum amount of damages recoverable in an action under such statute."

And see:

U. S. Cast Iron Pipe & Foundry Co. vs. Sullivan, 3 F. 2d 794 (C. A. 5, 1925); cert. denied, 268 U. S. 696;

Desoto Motor Corp. vs. Stewart, 62 F. 2d 914 (C. A. 10, 1932;

Schloss vs. Matteucci, 260 F. 2d 16 (C. A. 10, 1958).

This Court has not yet determined that the Full Faith and Credit clause does not *require* a state, in entertaining an action based upon the wrongful death statute of another state, to accept the limit on damages provided by

the statute creating the cause of action. The first decision of the Second Circuit in *Pearson vs. Northeast Airlines, Inc.*, 307 F. 2d 131, held that the *Kilberg* result was unconstitutional as failing to give full faith and credit to the Massachusetts wrongful death statute. In the reversal en banc of its earlier decision, at 309 F. 2d 553 (1962), the Court, divided six to three, held that this partial acceptance of the Massachusetts statute did not violate the full faith and credit requirement. This Court denied certiorari, and in its later opinion in *Van Dusen vs. Barrack, Admx.*, 376 U. S. 612, it stated (p. 629, footnote 24):

> "The defendants, rejecting the view adopted by the Second Circuit in *Pearson v. Northeast Airlines, Inc.*, 309 F. 2d 553, contend that the Full Faith and Credit Clause requires Pennsylvania courts to follow all the terms of the Massachusetts Death Act. We intimate no view concerning this contention."

No such issue appears in the instant case, however. The District Judge, following the clearly defined Ohio conflict of laws rule, has adopted the entire Virginia wrongful death act. Only if he had refused to do so would the constitutional question arise.

This case presents no substantial question under the Constitution of the United States.

4. Is the decision of the Court of Appeals for the Second Circuit in Pearson vs. North East Airlines, Inc., 309 F. 2d 553, cert. den. 372 U. S. 912, in conflict with the decision of the Court of Appeals for the Sixth Circuit in this case?

Petitioner suggests that as the constitutions of the States of Ohio and New York each prohibit monetary limits on the amount recoverable in a wrongful death case and the end result differs, a conflict exists between the

decision of the United States Court of Appeals for the Sixth Circuit herein and the decision of the Second Circuit Court of Appeals in *Pearson vs. North East Airlines,* 309 F. 2d 553 (cert. den. 372 U. S. 912).

Each case is a case of diversity jurisdiction and in each case the Federal Court followed the State Court decisions on a conflict of law question, as it was required to do.

> *Klaxon Company vs. Stentor Electric Mfg. Co.,* 313 U. S. 487 (1941).

The *Pearson* case followed the state law of New York as declared in *Kilberg vs. North East Airlines, Inc.,* 9 N. Y. 2d 34, 172 N. E. 2d 526 (1961). In the *Pearson* case, the Court of Appeals for the Second Circuit said (309 F. 2d at 556):

> "We hold that the ruling of the New York Court of Appeals in Kilberg was a proper exercise of the state's power to develop conflict of laws doctrine; and the court's refusal to apply the limitation of recovery provision in the Massachusetts statute a constitutional exercise of such power."

And again on page 562 that Court of Appeals said:

> "We must emphasize that we are not concerned here with the *wisdom* of New York's choice-of-law, but only with its *power* to choose as it did in Kilberg."

The *Pearson* case involves primarily the question whether the Full Faith and Credit clause of the United States Constitution, Article IV, Section 1, required New York courts to apply the monetary limits of recovery provided by the Massachusetts wrongful death statute. No such constitutional issue is presented by the present case, since it is found that the Ohio courts would, by the Ohio choice-of-law rule, apply the Virginia statute in any event,

and the power of Ohio to make a different choice is not in question.

The difference in end result of the decisions is, of course, produced by a difference in state law.

As the Sixth Circuit opinion points out (Appendix A, p. 26):

> "It is to be noted that all of these cases except *Pearson*, were decided by state courts. No federal court deviated from the rule of conflict of laws adopted by the state in which it sat. In *Pearson, supra,* the Second Circuit followed the New York court in *Kilberg.*"

CONCLUSION.

Activity in the state courts in the field of conflicts of law in tort cases may well bring to this Court questions of the limits of state power to act, in implementation of *Richards v. United States, supra.* This case is not such a case. Assuming Ohio to be the residence or domicile of petitioner's decedent, an interest in the State of Ohio in this action, sufficient to permit application of its conflict of laws rule, is obvious and conceded. The power of the Ohio state courts to determine the measure of damages for this action is, therefore, not the issue; the propriety of the state determination is not a matter which this Court will review.

The Ohio District Court has followed the Ohio conflict of laws decisions, and has reached the result which an Ohio state court would reach. No change in Ohio law should be attempted in the federal courts.

The question in the *Pearson* case of the application of the Full Faith and Credit clause is not presented here, and there is no other substantial constitutional issue.

We respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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